The reason is, of course, that the first is a charitable purpose, the second is not. Of efforts to circumvent this rule there is no end. *In re Tyler* (1891) 3 Ch. 252, upheld a bequest on such a condition, where a larger sum than would be needed for that purpose was bequeathed, on the ground that there was nothing to show that funds for the care would not be secured elsewhere in order to secure the bequest, and so no part of the bequest would be used for the purpose. A similar bequest was upheld in *Roche* v. *M. Dermott,* [1901] 1 Ir. 394, though the court said the contract to care for the lot which the charitable society was required to enter into as a condition precedent to the gift taking effect, was unenforceable, binding on conscience only. *In re Davis,* [1915] 1 Ch. 543, approved in *In re Tyler, supra,* but held that as the gift over was not to a charity the first gift was freed from the obligation to repair the graves. The court took no notice of the argument urged on its attention that the fund was so small it would be entirely required to keep up the graves, and the charity would get nothing. A safer method of securing perpetual care is that of the principal case, viz., a bequest to a municipal corporation having power to receive such trust funds in perpetuity. See also *Shippee* v. *Industrial Trust Co.* (R. I. 1920) 110 Atl. 410.

CONSTITUTIONAL LAW—DISCRIMINATION AGAINST FOREIGN CORPORATIONS —Defendant, a sheriff, levied on a motor truck belonging to plaintiff, a Pennsylvania corporation, for non-payment of the North Carolina license. Laws N. C. 1917, c. 231, § 72, imposed a license tax on automobile manufacturers with a proviso that the tax on such manufacturers who had invested three-fourths of their assets in state securities or personal property within the state should be only one-fifth of the amount imposed on others. Plaintiff sued to restrain the sale, asserting that the act denied plaintiff the equal protection of the laws, and was an attempt by the state to regulate interstate commerce. *Held,* (two justices dissenting), the act is unconstitutional. *Bethlehem Motors Corporation* v. *Flynt,* 41 Sup. Ct. 571.

The Supreme Court of the United States, in the instant case, has added another decision on the position of the foreign corporation in constitutional law, following along the path marked out in *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1; *Pullman Co.* v. *Kansas,* 216 U. S. 56; *Southern Ry. Co.* v. *Greene,* 216 U. S. 400. Preceding these cases the doctrine had been set forth that since a state had the absolute right to exclude foreign corporations, it therefore had the right to admit them on any condition it saw fit, *Paul* v. *Virginia,* 8 *Wall,* 168, except that the state could not prevent a foreign corporation from doing interstate business within the state, *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.,* 96 U. S. 1. Since 1906 further qualifications have been added to the effect that the state cannot impose unconstitutional conditions, *Donald* v. *P. & R. C. & I. Co.,* 241 U. S. 329, nor provisions contrary to the Fourteenth Amendment in regard to due process and equal protection of the laws, *Southern Ry. Co.* v. *Greene, supra, Western Union Telegraph Co.* v. *Kansas, supra.* In the case at bar the court say that either the corporation is within the jurisdiction of North Carolina or out of it, and if it is assumed that the plaintiff is within the

jurisdiction, in the sense of having an agent therein and doing business within the state, then it has been discriminated against. The proviso in the statute can be satisfied by a resident manufacturer, his factory and its products in the first instance being within the state; it cannot be satisfied by a non-resident manufacturer, his factory necessarily being in another state, some of its products only at a given time being within the state. But if it is assumed the corporation was not within the state, the act was an attempt to regulate interstate commerce by levying a tax on imports, because a tax on an agent of a foreign corporation for the sale of a product is a tax on the product, and if the product be that of another state, it is a tax on commerce between states, and hence invalid. *Welton* v. *Missouri,* 91 U. S. 275; *Darnell & Son* v. *Memphis,* 208 U. S. 113. For other references see HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW, Chapter 6 *et seq.; International Paper Co.* v. *Massachusetts,* 246 U. S. 135; 16 MICH. L. REV. 264, 447; 9 MICH. L. REV. 549; BEALE FOREIGN CORPORATIONS, Chapter 5.

CONSTITUTIONAL LAW—EXCESS PROFITS TAX—INVESTED CAPITAL—Plaintiff claimed a refund of $1,081,184.61 paid as excess profits tax under title II of Revenue Act of 1917 (Ch. 63, 40 Stat. 300, 302 *et seq.*). The Act provides for deduction from income of a sum equal to a certain percentage of the invested capital and surplus for the taxable year, which shall be exempt from the tax. Plaintiff had bought, in 1904, certain lands for $190,000, which increased in value to about $10,000,000 by 1912. Plaintiff declared a stock dividend against this increase, by taking back the old stock, and giving twice as much new stock in return. In the tax return for 1917, the assessor refused to include the $10,000,000 increase as capital or surplus. On demurrer to the petition for refund, *held*: the demurrer should be sustained. *La Belle Iron Works* v. *United States,* (1921), 41 Sup. Ct. Rep. 528.

It was contended by the plaintiff that (1) the increase in value should be included as invested capital, or paid in or earned surplus; (2) should be considered as property paid in for stock under Sec. 207 (a) (2) of the Act; (3) that the construction based on cost alone was arbitrary, and violated due process of law. Most of the opinion is an interpretation of what Congress meant by "invested capital." It seems quite clear that Congress had in mind the cost basis, rather than present value. The court disposed of the second contention by saying that the exchange of stock was a purely internal transaction, referring to *Eisner* v. *Macomber,* 252 U. S. 189, which decided that stock dividends were not income as regards the income tax. The court showed that the purpose of Congress was to tax income in excess of a certain return on the capital actually embarked in the enterprise, and called the appreciation of value simply an unearned increment. This is not a new conception of capital. In *Bailey* v. *Clark,* 21 Wall 284, a case arising under a Revenue Capital tax, it was said that the term applied "only to the property or means contributed by the stockholders as a fund or basis for the business or enterprise for which the corporation was formed." And see statement in *In Re Simon,* 268 Fed. 1006 at p. 1008. For other examples of what is and